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Constitution, statutes and rule:

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-5443

JAMES EDWARD BARNES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (App. 19–21) is reported at 466 F. 2d 1361.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 1972. The petition for a writ of certiorari was filed on September 21, 1972, and was granted on December 4, 1972 (App. 22). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

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QUESTIONS PRESENTED

1. Whether a jury may properly be instructed that possession of recently stolen goods, if not satisfactorily explained, is a circumstance from which it may, but is not required to, infer that the possessor knew the property was stolen.

2. Whether, in a prosecution under 18 U.S.C. 1708 for possessing Treasury checks stolen from the mail, guilt may be established by proving that the accused knew the Treasury checks he possessed were stolen, without also proving that he knew they were stolen from the mail.

3. Whether, in a prosecution under 18 U.S.C. 495, one may properly be convicted and sentenced to concurrent prison terms on separate counts of forging an endorsement on a Treasury check and uttering the same check.

STATUTES INVOLVED

1. 18 U.S.C. 1708 provides:

> Whoever steals, takes, or abstracts, or by fraud or deception obtains, or attempts so to obtain, from or out of any mail, post office, or station thereof, letter box, mail receptacle, or any mail route or other authorized depository for mail matter, or from a letter or mail carrier, any letter, postal card, package, bag, or mail, or abstracts or removes from any such letter, package, bag, or mail, any article or thing contained therein, or secretes, embezzles, or destroys any such letter, postal card, pack-

age, bag, or mail, or any article or thing contained therein; or

Whoever steals, takes, or abstracts, or by fraud or deception obtains any letter, postal card, package, bag, or mail, or any article or thing contained therein which has been left for collection upon or adjacent to a collection box or other authorized depository of mail matter; or

Whoever buys, receives, or conceals, or unlawfully has in his possession, any letter, postal card, package, bag, or mail, or any article or thing contained therein, which has been so stolen, taken, embezzled, or abstracted, as herein described, knowing the same to have been stolen, taken, embezzled, or abstracted—

Shall be fined not more than $2,000 or imprisoned not more than five years, or both.

2. 18 U.S.C. 495 provides:

Whoever falsely makes, alters, forges, or counterfeits any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive from the United States or any officers or agents thereof, any sum of money; or

Whoever utters or publishes as true any such false, forged, altered, or counterfeited writing, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited; or

Whoever transmits to, or presents at any office or officer of the United States, any such writing in support of, or in relation to, any

account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited—

Shall be fined not more than $1,000 or imprisoned not more than ten years, or both.

STATEMENT

Petitioner was charged in an eight count indictment (App. 2–4), returned in the United States District Court for the Central District of California, with various offenses arising out of the theft of four Treasury checks from the mail. The first four counts, charging violations of 18 U.S.C. 1708, alleged that petitioner had in his possession the contents of letters which had been addressed to Nettie Lewis, Albert Young, Arthur Salazar, and Mary Hernandez, and which had been stolen from the mail. Counts five through eight, charging violations of 18 U.S.C. 495, alleged that petitioner forged the endorsements of payees Nettie Lewis and Mary Hernandez on Treasury checks and that he uttered those checks knowing the endorsements to be forged.

After a jury trial, petitioner was convicted on the six counts relating to Nettie Lewis and Mary Hernandez and was acquitted on the two counts charging possession of stolen mail relating to Albert Young and Arthur Salazar (App. 18). He was sentenced to concurrent three year terms of imprisonment on each count.

1. The evidence at the trial showed that on June 2, 1971, petitioner, falsely identifying himself as "Clarence Smith," opened a checking account in that name

at an Inglewood, California, branch of the Crocker National Bank (App. 9–10). On or about July 1 and July 3, 1971, the United States Disbursing Office at San Francisco issued and mailed four United States Treasury checks, in the amounts of $269.02, $154.70, $184.00, and $268.80, to Nettie Lewis, Albert Young, Arthur Salazar, and Mary Hernandez (App. 5–6; Tr. 16).[1] On July 8, 1971, at a different branch of the Crocker National Bank, petitioner deposited these four checks into the "Smith" account. Each check carried the apparent endorsement of the payee and a second endorsement by "Clarence Smith" (App. 10–11).

The payees of the four checks each testified that he or she (1) had expected but had never received the check, (2) had not authorized petitioner to receive his or her mail or to negotiate the check, and (3) had not made the endorsement on the check deposited by petitioner (App. 6–9; Tr. 21–26).

A government handwriting expert testified that he concluded, after comparing the purported signatures of the four payees and of Clarence Smith on the checks with handwriting exemplars obtained from petitioner, that the signatures of Nettie Lewis and Mary Hernandez, as well as the four Clarence Smith signatures, were made by petitioner (App. 14).[2]

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[1] These facts were the subject of a stipulation. The appendix contains only that portion of the stipulation relating to the Lewis and Hernandez checks.

[2] The witness's findings with respect to the Young and Salazar signatures were inconclusive. Although he found "a number of similarities" between petitioner's handwriting and

Petitioner did not testify at trial, but a postal inspector who interviewed him after his arrest related certain statements petitioner made during the interview.[3] Petitioner told the inspector that he had opened the Clarence Smith account in Inglewood on or about June 1, 1971,[4] that he had been in the furniture business and had received the checks in question from "dudes and chicks" who sold furniture for him door-to-door, and that the checks had been signed in the payees' names when he received them. Petitioner said he could not name or identify any of the salespeople, and could not substantiate the existence of any furniture orders because the salespeople wrote their orders on scratch paper that was not retained. Petitioner admitted that he made the Clarence Smith endorse-

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the purported signatures of Young and Salazar, in each case he "did not feel that in the aggregate these similarities were sufficient for me to make an absolute conclusive statement concerning [petitioner's] authorship of it" (Tr. 76–77). The indictment did not charge petitioner with forging and uttering the Young and Salazar checks.

[3] Petitioner had first been advised of his constitutional rights, had stated his willingness to waive those rights and discuss the case with the inspector, and had signed a waiver-of-rights form (Tr. 44–46; App. 11–12).

[4] At a brief hearing out of the jury's presence, the inspector testified that petitioner said he had used an alias because he was then on parole and thought it might cause trouble to use his real name (Tr. 46, 47–48). The district court, after ascertaining that the government would not seek to impeach petitioner with prior convictions if he chose to testify, ordered that no reference was to be made in the jury's presence to petitioner's statement that he had been on parole (Tr. 48).

ments and deposited the checks, but he denied signing the payees' endorsements. (App. 12; Tr. 55.)[5]

2. The district court instructed the jury that "[t]hree essential elements are required to be proved" to establish guilt under 18 U.S.C. 1708: that the accused unlawfully had in his possession the contents of a letter, that the contents were stolen from the mail, and that the accused "knew the contents had been stolen" (App. 15–16). Over petitioner's objection (Tr. 123–124), the court instructed that "[p]ossession of recently stolen property, if not satisfactorily explained," was a circumstance from which the jury might, but need not, "draw the inference and find, in the light of the surrounding circumstances shown by the evidence in the case," that the possessor knew the property had been stolen. The court emphasized that the jury was "never required to make this inference," that possession may be satisfactorily explained through evidence other than the testimony of the accused, and that the accused need not testify.[6]

[5] Defense counsel, in argument to the jury, characterized the statements made to the inspector as petitioner's "side of the story" (Tr. 107), and suggested that petitioner found it unnecessary to take the stand because "all the facts came out" through the inspector's testimony (Tr. 107–108).

[6] The full instruction on the inference from unexplained possession is as follows (App. 16; Tr. 123–124):

"Possession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the inference and find, in the light of the surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen.

"However, you are never required to make this inference. It is

The court also instructed the jury that it was "permitted to draw, from facts which you find have been proved, such reasonable inferences as you feel are justified in the light of experience" (Tr. 117), that "the burden is always upon the prosecution to prove beyond a reasonable doubt every essential element of the crime charged" (Tr. 126, 127), that "[t]he law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence" (Tr. 120, 126, 127), and

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the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence in this case warrant any inference which the law permits the jury to draw from the possession of recently stolen property.

"The term 'recently' is a relative term, and has no fixed meaning. Whether property may be considered as recently stolen depends upon the nature of the property, and all the facts and circumstances shown by the evidence in the case. The longer the period of time since the theft the more doubtful becomes the inference which may reasonably be drawn from unexplained possession.

"If you should find beyond a reasonable doubt from the evidence in the case that the mail described in the indictment was stolen, and that while recently stolen the contents of said mail here, the four United States Treasury checks, were in the possession of the defendant you would ordinarily be justified in drawing from those facts the inference that the contents were possessed by the accused with knowledge that it was stolen property, unless such possession is explained by facts and circumstances in this case which are in some way consistent with the defendant's innocence.

"In considering whether possession of recently stolen property has been satisfactorily explained, you are reminded that in the exercise of constitutional rights the accused need not take the witness stand and testify.

"Possession may be satisfactorily explained through other circumstances, other evidence, independent of any testimony of the accused."

that "no presumption of guilt may be raised, and no inference of any kind may be given, from the failure of a defendant to testify" (Tr. 120).

3. The court of appeals affirmed petitioner's conviction on the six counts relating to the Nettie Lewis and Mary Hernandez checks (App. 19–21). It held that the evidence, viewed in the light most favorable to the government, "is more than adequate to sustain" the convictions for possessing stolen mail (App. 19), and it stated that "we cannot here hold that permitting the jury to infer knowledge from [petitioner's] possession was impermissible because of any 'lack of a rational connection between [them] in common experience'" (App. 21). Because petitioner received identical concurrent sentences on all six counts, the court declined to consider his challenges to the convictions on the forgery and uttering counts (App. 21).

SUMMARY OF ARGUMENT

I

A. This Court's decisions relating to the validity of "statutory presumptions" provide the standard for determining whether the instructions in this case were consistent with due process. The inference of knowledge from unexplained possession of recently stolen property is proper if it can "be said with substantial assurance that the presumed fact [knowledge] is more likely than not to flow from the proved fact [unexplained possession] on which it is made to depend" (*Leary* v. *United States*, 395 U.S. 6, 36).

B. The district court correctly instructed the jury that it could, although it was not required to, infer from the petitioner's unexplained possession of recently stolen property that he knew the property was stolen. The inference is deeply rooted in the common law, has been almost universally recognized in this country from the beginning, and accords with human experience. This Court on several occasions has recognized and approved the inference of knowledge or theft from one's unexplained possession of stolen goods, and instructions on such inferences have long been approved by the lower federal courts.

The evidence as a whole—including petitioner's possession of the checks shortly after they were mailed, his forgery of the payees' signatures, his use of an alias, his false denial to the postal inspector that he signed the payees' names, and his implausible tale about unsubstantiated furniture sales—justified the jury in concluding beyond a reasonable doubt that he knew the checks were stolen. The district court properly charged the jury that it could find knowledge only on the basis of all the evidence, including the permissible inference.

Moreover, under this Court's decisions in *Leary, supra,* and *Turner* v. *United States,* 396 U.S. 398, the inference here would be sustained even if the test were whether knowledge flows beyond a reasonable doubt from unexplained possession. One who possesses recently stolen Treasury checks payable to strangers and

is unable to explain the circumstances satisfactorily must be aware of the high probability that those checks were stolen.

The fact that both possession and knowledge are elements of the offense here does not preclude the drawing of an inference of the latter from the former.

C. The instruction on the inference did not impermissibly interfere with petitioner's decision not to testify. Any pressure upon him to take the stand resulted not from the court's instructions—which specified that possession could be explained by evidence other than the accused's testimony and that the accused need not take the stand—but from the strength of the government's case against him.

Nor were the instructions an adverse comment on his decision not to testify. The court charged the jury that the defendant need not testify and that no inference could be drawn from his failure to do so; it also instructed that the defendant's possession could be explained by "other circumstances, other evidence, independent of the testimony of the accused."

D. Even if the instruction on the inference from unexplained possession was improperly given, the error, in the circumstances of this case, was harmless. The jury found petitioner guilty of forging the checks, and this alone implies that he knew they were stolen. Moreover, the verdict acquitting petitioner of possessing two other checks indicates that the jury relied not upon the inference, which was available as to all four checks, but upon the testimony of the handwriting

expert, who found that petitioner had signed the payees' names on the two checks that he was found guilty of possessing.

II

Under 18 U.S.C. 1708, which makes it a crime to possess any article stolen from the mail "knowing [it] * * * to have been stolen," it is unnecessary for the government to prove that the accused knew the article had been stolen from the mail. This unambiguous meaning of the statutory language is confirmed by its legislative history, which shows that Congress intentionally eliminated the requirement in an earlier version of the statute that the defendant know that the theft had been from the mail.

III

Petitioner argues that his conviction and sentencing on the separate counts of forging and uttering the checks was impermissible "double punishment." Since petitioner received identical concurrent sentences on all four counts of forgery and uttering and both counts of possession, there is no occasion for this Court to consider the contention. In any event, 18 U.S.C. 495 makes forgery and uttering separate crimes, involving different elements. One can forge a check without uttering it, or utter it without having forged it. There is nothing unreasonable about punishing those separate crimes separately.

ARGUMENT

I

THE DISTRICT COURT PROPERLY INSTRUCTED THE JURY THAT IT COULD INFER FROM PETITIONER'S UNEXPLAINED POSSESSION OF RECENTLY STOLEN PROPERTY THAT HE KNEW THE PROPERTY WAS STOLEN

The principal issue in this case is whether the Fifth Amendment's due process clause or petitioner's privilege against self-incrimination were violated by the district court's instruction that unexplained possession of recently stolen property is a circumstance from which the jury may infer that the possessor knew the property was stolen.[7] The court charged that the jury was not required to draw the inference, but merely could do so; and that, in deciding whether the defendant knew that the property he possessed was stolen, the jury should consider not only the inference but also "the surrounding circumstances shown by the evidence in the case" (Tr. 123). This case, therefore, involves no issue

[7] Petitioner asserts (Br. 7, 8, 14, 17), without elaboration or explanation, that his Sixth Amendment rights are also implicated. In our view, there is nothing in the Sixth Amendment that, under the decisions of this Court, arguably precludes the instruction given in this case, and we do not understand the basis of petitioner's assertion. Mr. Justice Black's view that "statutory presumptions" violate the Sixth Amendment right to trial by jury was implicitly rejected by the Court in *United States* v. *Gainey*, 380 U.S. 63, 76–81 (dissenting opinion), and even he saw no constitutional problem with judicially-created inferences. See *Bollenbach* v. *United States*, 326 U.S. 607, 616–618 (dissenting opinion). In any event, if, as we show below, the instruction was consistent with due process and did not abridge petitioner's Fifth Amendment privilege, we do not believe it could impermissibly affect any Sixth Amendment interest.

of the reasonableness of a statutory presumption, but only the propriety of the particular inference the jury was authorized to make in weighing the circumstantial evidence in this case.

A. A JURY MAY BE AUTHORIZED TO INFER FROM PROVED FACTS ANOTHER FACT WHICH IS ESSENTIAL TO GUILT IF IN REASON AND EXPERIENCE THE INFERRED FACT IS MORE LIKELY THAN NOT TO FLOW FROM THE PROVED FACT

The standards by which to determine the constitutionality of jury instructions concerning permissible inferences are provided by this Court's decisions on the validity of "statutory presumptions." The basic question in both contexts is the same: whether the instructions had the effect of permitting the jury to convict the defendant on insufficient evidence. See *United States* v. *Romano,* 382 U.S. 136, 141–144; *Leary* v. *United States,* 395 U.S. 6, 37 (issue is whether the statute "permits conviction upon insufficient proof" of an element of the offense); *Turner* v. *United States,* 396 U.S. 398, 407 ("the question on review is the sufficiency of the evidence"); *Dunlop* v. *United States,* 165 U.S. 486, 502 (non-statutory inference from unexplained possession of recently stolen property "is sufficient to authorize the jury to convict"). The constitutional standards for evaluating inferences authorized by statute are therefore no different than those for assessing judicially-created inferences. *United States* v. *Johnson,* 433 F. 2d 1160, 1168, n. 55 (C.A. D.C.).[8]

[8] This Court has stated that, in applying the standards to a specific inference, particularly "in matters not within specialized judicial competence or completely commonplace" or

The constitutional test for jury instructions on permissible inferences was announced in *Tot* v. *United States*, 319 U.S. 463. At issue there was the validity of a provision of the Federal Firearms Act that permitted a jury to infer from the accused's possession of a firearm both that he had received it in interstate or foreign commerce and that he had received it after the effective date of the statute. The Court, recognizing (*id.* at 467) that "[t]he jury is permitted to infer from one fact the existence of another essential to guilt, if reason and experience support the inference," nonetheless held the statutory provision unconstitutional because it failed to meet the following standards (*id.* at 467–468):

> [A] statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience. This is not to say that a valid presumption may not be created upon a view of relation broader than that a jury might take in a specific case. But where the inference is so strained as not to have a reasonable relation to the circumstances

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where the courts have differed over the permissibility of the inference, "significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it." *United States* v. *Gainey*, 380 U.S. 63, 67. See, also, *Leary* v. *United States*, 395 U.S. 6, 36. We show below that the inference from possession of recently stolen property is one that has historically been viewed as "within specialized judicial competence" and as "completely commonplace." That it is not embodied in a statutory provision is therefore of no importance in the context of this case.

> of life as we know them, it is not competent for the legislature to create it as a rule governing the procedure of courts.

This test of "rational connection * * * in common experience" was reaffirmed in *United States* v. *Gainey*, 380 U.S. 63, 66–67, and *United States* v. *Romano*, 382 U.S. 136, 139, where the Court considered statutory provisions authorizing a jury to infer from the accused's unexplained presence at an illegal still that he was unlawfully carrying on the business of a distiller and that he was in possession and control of the still. Thereafter, in *Leary* v. *United States*, 395 U.S. 6, the Court stated (*id.* at 36):

> The upshot of *Tot*, *Gainey*, and *Romano* is, we think, that a criminal statutory presumption must be regarded as "irrational" or "arbitrary," and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend. * * *

The Court in *Leary* struck down a statute which allowed a jury to infer from the accused's possession of marihuana both that the drug had been illegally imported and that the accused knew it was illegally imported, on the ground that the provision did not satisfy this more-likely-than-not standard. It therefore did not reach the question whether a statutory presumption that satisfies the more-likely-than-not standard "must also satisfy the criminal 'reasonable doubt' standard if proof of the crime charged or an essential element thereof depends upon its use" (395 U.S. at

36, n. 64). The issue was left unresolved again in *Turner* v. *United States*, 396 U.S. 398, where the Court considered several provisions permitting inferences from possession of narcotic drugs. Those it upheld satisfied both tests (see 396 U.S. at 416), while those it struck down did not meet even the more-likely-than-not standard (see *id.* at 419).

As in *Leary* and *Turner*, the Court need not resolve the issue here for, as we show below, the inference on which the district court instructed the jury in this case satisfies any formulation of the applicable test. We submit, however, that if the Court reaches the issue, the proper test is the more-likely-than-not standard stated by the Court in *Leary*, and not a requirement that the proven fact must establish the inferred fact beyond a reasonable doubt.

The jury is permitted to draw inferences because they accord with common experience concerning conclusions that reasonable men may and normally do draw from established facts. They are a technique of judicial administration designed to avoid the introduction of evidence which is ordinarily difficult to produce and which in any event is unnecessary because even without the evidence the jury normally would draw the inference. A defendant is protected against being convicted without sufficient evidence by the instruction that every element of the offense must be proved beyond a reasonable doubt.

One element of the crime of which petitioner was convicted was that he knew that the checks were stolen. The court charged the jury that it must so find,

and that in considering that finding it was to consider both the inference and all other evidence. The drawing of the inference of petitioner's knowledge from his possession of the recently stolen checks is merely one element of the proof.

In determining the factual issues in any case, the jury necessarily draws a large number of inferences. Here, for example, there was no direct evidence that the checks had been stolen from the mail. The jury inferred that fact from the circumstantial evidence that the checks were mailed but were never received by the addressees. The inference was permissible because in reason and experience the most likely explanation of the circumstances was that the checks were stolen while in the custody of the postal system. There is no reason to apply to the inference that one who possesses recently stolen property knows it is stolen the requirement that the conclusion must follow from the premise beyond a reasonable doubt. The reasonable-doubt standard governs the proof of all elements of the crime, but not the validity of the inferences the jury draws in determining those elements.

Rule 303 of the proposed Federal Rules of Evidence is in accord with the view that the reasonable-doubt inquiry should relate to the evidence as a whole rather than to the inference standing alone. It provides that the judge "may submit the question of guilt or of the existence of the presumed fact to the jury, if, but only if, a reasonable juror *on the evidence as a whole, including the evidence of the basic facts,* could find guilt or the presumed fact beyond a reasonable doubt" (Rule 303(b); emphasis added). Similarly, the rule

directs the judge to instruct the jury that, where the "presumed fact" is an element of the offense, "its existence must, *on all the evidence*, be proved beyond a reasonable doubt" (Rule 303(c); emphasis added).[9]

B. THE DISTRICT COURT PROPERLY INSTRUCTED THE JURY ON THE INFERENCE IT COULD DRAW FROM PETITIONER'S UNEXPLAINED POSSESSION OF RECENTLY STOLEN PROPERTY

1. The inference from possession of recently stolen property that the possessor knows the property is stolen is deeply rooted in the common law and is almost universally recognized as reflecting common human experience

Inferences are accepted by courts as reasonable when, over the course of human experience, it is perceived that one fact ordinarily follows from another. Thayer, in his *Preliminary Treatise on Evidence*

[9] The Rule provides in full:

"(a) *Scope.*—Except as otherwise provided by Act of Congress, in criminal cases, presumptions against an accused, recognized at common law or created by statute, including statutory provisions that certain facts are prima facie evidence of other facts or of guilt, are governed by this rule.

"(b) *Submission to jury.*—The judge is not authorized to direct the jury to find a presumed fact against the accused. When the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge may submit the question of guilt or of the existence of the presumed fact to the jury, if, but only if, a reasonable juror on the evidence as a whole, including the evidence of the basic facts, could find guilt or the presumed fact beyond a reasonable doubt. When the presumed fact has a lesser effect, its existence may be submitted to the jury if the basic facts are supported by substantial evidence, or are otherwise established, unless the evidence as a whole negatives the existence of the presumed fact.

"(c) *Instructing the jury.*—Whenever the existence of a presumed fact against the accused is submitted to the jury, the judge shall give an instruction that the law declares that the jury may regard the basic facts as sufficient evidence of the

(1898), described the process by which presumptions or inferences are created (p. 326):

> Many facts and groups of facts often recur, and when a body of men with a continuous tradition has carried on for some length of time this process of reasoning upon facts that often repeat themselves, they cut short the process and lay down a rule. To such facts they affix, by a general declaration, the character and operation which common experience has assigned to them. * * *

For centuries, the courts have recognized several reasonable inferences that may be drawn from a person's unexplained possession of recently stolen property: (a) that he knew the property was stolen,[10] (b) that he not only knew the property was stolen but was himself the thief,[11] and (c) that he was not only the thief but also the perpetrator of any other crime that may have been committed together with the theft.[12] The inference at issue here is the first of these. If either of the others is reasonable, then the inference of knowledge is *a fortiori* reasonable, because the others necessarily presuppose knowledge that the property was stolen.

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presumed fact but does not require it to do so. In addition, if the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge shall instruct the jury that its existence must, on all the evidence, be proved beyond a reasonable doubt."

[10] See Christie and Pye, *Presumptions and Assumptions in the Criminal Law: Another View*, 1970 Duke L.J. 919, 925-926.

[11] See 9 Wigmore, *Evidence* § 2513 (3d. ed. 1940); *United States* v. *Johnson*, 433 F. 2d 1160, 1169 (C.A.D.C.)

[12] See *Wilson* v. *United States*, 162 U.S. 613.

The historical development of these inferences was traced by Thayer, who, in illustrating "rules of presumption" "running through a dozen centuries," adverted to the inference from unexplained possession (*Treatise, supra,* at 328):

> To be found thus in the possession of stolen goods was a serious thing; if they were recently stolen, then was one "taken with the mainour,"—a state of things that formerly might involve immediate punishment, without a trial; and, later, a trial without a formal accusation; and, later still, a presumption of guilt which, in the absence of contrary evidence, justified a verdict, and at the present time is vanishing away into the mere judicial recognition of a permissible inference,—as it is stated in Stephen's "Digest of Criminal Law:" "The inference that an accused person has stolen property or has received it, knowing it to be stolen, may be drawn from the fact that it is found in his possession after being stolen, and that he gives no satisfactory account of the way in which it came into his possession." * * *

Thayer added in a footnote (*ibid.,* n. 5): "Probably the reason of the existence and persistence of the 'presumption' * * * is found in what I have intimated in the text, namely, the long historical root that the thing has. It is found in all systems of law." [13]

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[13] See, also, 2 East, *Pleas of the Crown,* p. 656 (1803):

"It may be laid down generally, that wherever the property of one man, which has been taken from him without his knowledge or consent, is found upon another, it is incumbent on that other to prove how he came by it; otherwise the presumption

The validity of inferences from unexplained possession was upheld in a number of early American cases. See, *e.g., Commonwealth* v. *Millard,* 1 Mass. 6 (1804); *State* v. *Smith,* 24 N.C. 402 (1842); *Knickerbocker* v. *People,* 43 N.Y. 177 (1870); *State* v. *Raymond,* 46 Conn. 345 (1878); *Cook* v. *State,* 84 Tenn. 461 (1886). See, also, the detailed annotation in 101 Am. St. Rep. 481–524 (1904).

This Court, as early as 1896, upheld an instruction permitting a jury to infer the defendant's guilt of murder from his unexplained possession of the dead man's effects. *Wilson* v. *United States,* 162 U.S. 613. Wilson had been camping with the victim at about the time the murder was committed. When he was arrested two weeks later, he had possession of horses, a wagon, a gun, and a certificate of deposit belonging to the victim, as well as all the dead man's clothing. The government presented other highly incriminating evidence as well. The defendant testified in his own behalf, but, as this Court stated (*id.* at 615), "[h]is explanations of the appearances against him, on the stand and otherwise, were inadequate and improbable, and evidence in much detail showed that many of his statements were false." The trial judge instructed the jury that, if the accused was in possession of the dead man's property, and if that posses-

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is that he obtained it feloniously. This, like every other presumption, is strengthened, weakened, or rebutted, by concomitant circumstances, too numerous in the nature of the thing to be detailed. It will be sufficient to allude to some of the most prominent; such as, the length of time which has elapsed between the loss of the property and the finding it again * * *."

sion was not accounted for in a satisfactory way, then it may be "the foundation for a presumption of guilt" of the offense of murder (*id.* at 617). Rejecting Wilson's challenge to that instruction, this Court held (*id.* at 619, 620):

> Possession of the fruits of crime, recently after its commission, justifies the inference that the possession is guilty possession, and, though only *prima facie* evidence of guilt, may be of controlling weight unless explained by the circumstances or accounted for in some way consistent with innocence. * * * Proof that defendant had in his possession, soon after, articles apparently taken from the deceased at the time of his death is always admissible, and the fact, with the legitimate inference, is to be considered by the jury along with the other facts in the case in arriving at their verdict. * * *

In *Dunlop* v. *United States,* 165 U.S. 486, the Court referred to the traditional inference that the possessor of recently stolen property is the thief. The defendant there had sought an instruction that the presumption of innocence overrides all other presumptions. This Court responded that, if such a rule were adopted, convictions upon circumstantial evidence would be impossible, "since the gist of such evidence is that certain facts may be inferred or presumed from proof of other facts" (*id.* at 502). The Court stated (*ibid.*):

> Thus, if property recently stolen be found in the possession of a certain person, it may be

> presumed that he stole it, and such presumption is sufficient to authorize the jury to convict, notwithstanding the presumption of his innocence. * * *

This inference was recognized and approved by this Court in at least two other cases. In *McNamara* v. *Henkel,* 226 U.S. 520, the appellant challenged the determination of a United States Commissioner that there was probable cause to conclude that he committed the offense of burglary in British Columbia and therefore could be extradited. The evidence showed that an automobile had been stolen from a building between 4:00 and 6:00 a.m., and that appellant was seen trying to start the stolen car at about 6:00 a.m. some 40 feet from the building. This Court, citing *Wilson,* agreed with the district court that "this was evidence connecting the appellant with the crime * * *" (*id.* at 524). Appellant argued, however, that even if his possession of the stolen automobile permitted an inference that he participated in the larceny, it did not permit an inference that he committed the burglary. The Court held (*id.* at 525):

> The permissible inference is not thus to be limited. The evidence pointed to the appellant as one having control of the car and engaged in the endeavor to secure the fruits of the burglarious entry. Possession in these circumstances tended to show guilty participation in the burglary. This is but to accord to the evidence, if unexplained, its natural probative force. * * *

Finally, in *Rugendorf* v. *United States,* 376 U.S. 528, the defendant was convicted of receiving stolen

fur pieces which had been transported in interstate commerce, knowing them to have been stolen. It was stipulated that some of the furs had been stolen on February 10; these were found on March 22 in the basement of the defendant's home, in a closet opening off a regularly used recreation room and in which a fur belonging to the defendant's wife was also hanging. The defense was that the furs were placed there without the defendant's knowledge while he and his wife were vacationing elsewhere. He argued in this Court that the evidence was insufficient to convict him. The Court, quoting with approval the unexplained-possession rule stated in *Wilson,* held that "a prima facie case was made out by the stipulation and the presence of furs in petitioner's home" (*id.* at 537).

In view of the historic recognition of the unexplained-possession rule and its repeated approval by this Court, it has not surprisingly been referred to as "[o]ne of the few almost universally recognized presumptions * * *."[14] Model instructions authorizing a jury to infer knowledge of theft and interstate transportation, or knowledge of theft and guilt of theft, from the accused's unexplained possession of recently stolen property are included in a leading form book of federal jury instructions,[15] and similar instructions are regularly approved by the courts of appeals.[16]

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[14] Christie and Pye, *supra*, note 10, 1970 Duke L. J. at 925. See also, *United States* v. *Jones*, 418 F. 2d 818, 821 (C.A. 8).

[15] 1 Devitt and Blackmar, *Federal Jury Practice and Instructions*, §§ 13.10, 13.11 (2d ed. 1970).

[16] Among the many recent cases involving instructions similar to those given here are the following: *United States* v. *Karger*, 439 F. 2d 1108 (C.A. 1) (pledging as collateral stolen securi-

The proposed Federal Rules of Evidence would recognize the unexplained-possession rule.[17]

Mr. Justice Black stated, in his dissent in *Bollenbach* v. *United States*, 326 U.S. 607, 616–617, that the inference from unexplained possession has been accepted "since time immemorial" and that "[t]he experience of ages has justly given this particular type of circumstantial evidence a high value." This long

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ties, knowing them to be stolen); *United States* v. *Izzi*, 427 F. 2d 293 (C.A. 2) (interstate transportation of stolen securities); *United States* v. *Russo*, 413 F. 2d 432 (C.A. 2) (interstate transportation of stolen goods); *United States* v. *Coppola*, 424 F. 2d 991 (C.A. 2), certiorari denied *sub. nom. Connelly* v. *United States*, 400 U.S. 827 (interstate transportation of stolen securities); *United States* v. *Smith*, 446 F. 2d 200 (C.A.) (possession of stolen mail); *United States* v. *Ross*, 424 F. 2d 1016 (C.A. 4), certiorari denied, 400 U.S. 819 (concealing goods stolen from interstate commerce); *United States* v. *Winbush*, 428 F. 2d 357 (C.A. 6), certiorari denied, 400 U.S. 918 (possession of stolen mail); *United States* v. *Wolfenbarger*, 426 F. 2d 992 (C.A. 6) (receiving a stolen car moving in interstate commerce); *United States* v. *Hood*, 422 F. 2d 737 (C.A. 7), certiorari denied, 400 U.S. 820 (receipt and concealment of stolen automobiles); *United States* v. *Dilella*, 354 F. 2d 584 (C.A. 7) (possession of goods stolen from interstate commerce); *United States* v. *Liggins*, 451 F. 2d 577 (C.A. 8) (possession of stolen mail); *Foston* v. *United States*, 389 F. 2d 86 (C.A. 8), certiorari denied, 392 U.S. 940 (possession of stolen mail); *United States* v. *Marquez*, 462 F. 2d 620 (C.A. 9) (possession of goods stolen from a foreign shipment); *United States* v. *Garrett*, 457 F. 2d 1311 (C.A. 9) (possession of stolen mail); *Cotton* v. *United States*, 409 F. 2d 1049 (C.A. 10) (possession of stolen mail); *United States* v. *Baker*, 444 F. 2d 1290 (C.A. 10), certiorari denied, 404 U.S. 885 (possession of stolen mail); *Pendergrast* v. *United States*, 416 F. 2d 776 (C.A.D.C.) (robbery).

[17] Rule 303(a), quoted in note 9, *supra*, would carry forward "in criminal cases, presumptions against an accused, recognized at common law * * *."

history of judicial acceptance is strong evidence of the rational connection in common human experience between unexplained possession of recently stolen property and guilty knowledge, and it strongly supports the constitutionality of an instruction permitting the jury to infer the latter fact from the former.[18]

2. The inference permitted here satisfies both the more-likely-than-not and the reasonable-doubt standards.

a. The instruction in this case authorized the jury to infer from petitioner's unexplained possession of the recently stolen Treasury checks that he knew the checks were stolen. We think it is clear that there is a "rational connection" between the proved fact and the inferable fact and that the latter more likely than not flows from the former. This much at least is suggested by the historical roots of the inference and its universal acceptance by the courts, including this Court.

The judgment that guilty knowledge probably flows from unexplained possession requires neither empirical data nor an appreciation of probability theory. It is a commonplace observation, with which few adults would quarrel, that one who possesses property that

[18] Cf. *In re Winship*, 397 U.S. 358, 361–362:

"Although virtually unanimous adherence to the reasonable-doubt standard in common-law jurisdictions may not conclusively establish it as a requirement of due process, such adherence does 'reflect a profound judgment about the way in which law should be enforced and justice administered.'"

was recently stolen and who is unable to give a satisfactory explanation of his possession probably knows the property was stolen, either because he is himself the thief, or because he participated indirectly in the theft, or because he received the property under circumstances that would reasonably indicate it had been stolen.

It is uncommon, though not unheard of, for an innocent person to find himself in possession of stolen goods. On a rare occasion, one might purchase a wristwatch from a pawnbroker, for example, and discover later that it had been stolen in a robbery before it was pawned. But in those unusual circumstances there is a plainly adequate explanation for the possession. It would be far more extraordinary for an innocent person to have possession of stolen goods and to be *unable* to explain his possession. Though one can perhaps imagine a situation in which unexplained possession is consistent with a lack of knowledge that the goods are stolen, it is fair to say that in the overwhelming majority of cases the natural assumption would be that the possessor has guilty knowledge. The inference here thus satisfies the more-likely-than-not test.

The decisions in which this Court held statutory inferences arbitrary or irrational all involved inferences that depended upon highly empirical assumptions that were not supported by the available data or that did not square with human experience. In *Tot* for example, the defective statute authorized a jury to infer from possession of a firearm both that the

firearm was received in interstate commerce and that it was received after the Act's effective date. These facts, however, were not rationally connected, because there was insufficient basis for concluding from possession that a particular firearm was received by the accused in interstate commerce, and even less basis for concluding that it was received after a particular date. "[T]he presumptions created by the law are violent, and inconsistent with any argument drawn from experience" (319 U.S. at 468). By contrast, there is nothing violent about the inference here; the experience of generations teaches that one who possesses recently stolen property and who is unable to explain that possession ordinarily knows the property is stolen and, indeed, ordinarily participated in the theft.

In *Romano,* the inference from presence at a still to possession and control of the still did not comport with experience. "Presence tells us only that the defendant was there and very likely played a part in the illicit scheme. But presence tells us nothing about what the defendant's specific function was and carries no legitimate, rational or reasonable inference that he was engaged in one of the specialized functions connected with possession, rather than in one of the supply, delivery or operational activities having nothing to do with possession" (382 U.S. at 141). Here, as we have shown, unexplained possession has historically implied knowledge and does bear a reasonable relation to knowledge.

In *Leary* the Court was dealing with " 'highly empirical' " "data regarding the beliefs of marihuana

users generally about the source of the drug they consume," which were "'not within specialized judicial competence or completely commonplace'" (395 U.S. at 38). Though it concluded that "most domestically consumed marihuana comes from abroad" (*id.* at 44), it held that the available evidence does not support the assertion that one possessing marihuana is more likely than not to know it was illegally imported. "[I]t would be no more than speculation were we to say that even as much as a majority of possessors 'knew' the source of their marihuana" (*id.* at 53).

The Court's rejection in *Turner* of the statutory inferences from possession of cocaine was, as in *Leary*, grounded in an analysis of empirical data concerning the source of the drug and the chance that one possessing it would know it was illegally imported.

b. That the inference from unexplained possession satisfies the more-likely-than-not standard is, in our view, enough to sustain the validity of the inference. The only further inquiries in this case should be whether a reasonable juror could have found on all the evidence that petitioner knew the checks were stolen, and whether the district court's instructions properly placed the inference before the jury. The answer to both questions is yes.

The evidence showed that petitioner was in possession of the Lewis and Hernandez checks within several days of their theft. That he forged the payees' signatures on these checks. That he deposited the checks in a bank account [illegible] under a fals-

name, and that he falsely told the postal inspector the checks had contained the payees' signatures when he received them. The jury could, moreover, reasonably take into account that one who comes into possession of government checks that have not been endorsed by the payees is likely to know the checks are stolen. Petitioner's explanation, as related by the postal inspector, was wholly unsubstantiated and implausible, and the jury could properly have discredited it entirely as an explanation of petitioner's possession while considering also whether he would have invented such a tale if in fact his possession of the checks had been innocent. On this evidence the jury properly concluded that petitioner knew the checks had been stolen.

The district court correctly instructed the jury that possession of recently stolen property was a circumstance from which they *might* infer knowledge, while emphasizing that they were not *required* to draw that inference. The court also instructed that the prosecution was required to prove each element of the offense beyond a reasonable doubt and that the jury's findings as to knowledge should be made "in the light of the surrounding circumstances shown by the evidence in the case" (see note 6, *supra*). These instructions thus properly explained the function of the inference and indicated its relationship to the ultimate standard of proof beyond a reasonable doubt.

c. Even if the reasonable-doubt standard is applied to the unexplained-possession inference rather than the evidence as a whole—that is, even if the instruc-

tion here may be sustained only if it can be said that beyond a reasonable doubt the inferable fact (knowledge) flows from the proved fact (unexplained possession)—the inference was permissible. The considerations that led this Court to approve the statutory inferences in *Turner* and *Gainey* apply, we think, with even greater force to the unexplained-possession rule.

In *Turner*, this Court held that, because one who possesses heroin must be aware of the "high probability" that it was illegally imported, the statutory provision authorizing a jury to infer such knowledge from possession satisfied the reasonable-doubt as well as the more-likely-than-not tests. " 'Common sense' * * * tells us that those who traffic in heroin will inevitably become aware that the product they deal in is smuggled, unless they practice a studied ignorance to which they are not entitled" (396 U.S. at 417). Similarly, common sense tells us, even without the empirical inquiry made in *Turner*, that one who possesses recently stolen Treasury checks payable to persons he does not know, and who does not satisfactorily explain his possession, must be aware of the high probability that the checks have been stolen.

The Court also upheld in *Turner* the statute permitting the jury to infer from the defendant's possession of heroin that he purchased it in or from an unstamped package. Since "it is so extremely unlikely that a package containing heroin would ever be legally stamped," there could "be no reasonable doubt that one who possesses heroin did not obtain

it from a stamped package" (396 U.S. at 421–422). Moreover, there could be no reasonable doubt that the heroin was purchased (*id.* at 422):

> Since heroin is a high-priced product, it would be very unreasonable to assume that any sizable number of possessors have not paid for it, one way or another. Perhaps a few acquire it by gift and some heroin undoubtedly is stolen, but most users may be presumed to purchase what they use. * * *

On the same analysis, it would be "very unreasonable to assume that any sizable number of possessors" of recently stolen Treasury checks, who cannot explain that possession satisfactorily, are not at least aware that the checks are stolen.

Likewise, in *Gainey*, the Court sustained a statute permitting the jury to infer from the accused's presence at a still that he was engaged in the broadly inclusive offense of carrying on the business of a still. Because in the manufacture of illegal liquor "strangers to the illegal business rarely penetrate the curtain of secrecy" (380 U.S. at 67–68), the statute, by permitting an inference of participation from presence, merely accorded to the evidence its natural probative force. Indeed, the Court made clear that even in the absence of the statute an instruction permitting such an inference "would surely have been permissible" (*id.* at 70). Persons in unexplained possession of recently stolen property also "rarely" are without knowledge of its character.

d. The unexplained-possession rule comports with reality in another important respect. Knowledge that

property is stolen can seldom be proved by direct evidence, except where the accused has given inculpatory statements. If the jury were not permitted to draw the reasonable inference that one who cannot explain his recent possession knows the goods are stolen, it would often be impossible successfully to prosecute for illegal possession of stolen property, which currently is a serious and apparently widespread offense. See, *e.g.*, *Aron* v. *United States*, 382 F. 2d 965, 970–971 (C.A. 8). The accused is in a better position to deny knowledge and explain his possession than the government is to show by direct proof that he knew the property was stolen.[19]

c. Inferences such as this are normally drawn whenever circumstantial evidence is the basis for determining guilt or innocence. The inference in this case that one who possesses recently stolen property but fails to explain his possession knows that it is stolen is similar to the inferences juries draw every day. The presence of a defendant's fingerprints upon a particular item warrants the conclusion that the defendant handled it, and a defendant's footprints at a particular place justify the inference that the defendant was there. These latter inferences are basically no different than the inference the jury was permitted to draw in this case; in all of them the jury is permitted to

[19] Although this Court has held that this comparative consideration cannot, standing alone, sustain an otherwise impermissible inference (*Tot*, *supra*, 319 U.S. at 469; *Leary*, *supra*, 395 U.S. at 34, 44–45), it has also stated that the factor is significant where, as here, "the inference is a permissible one" (*Tot*, *supra*, 319 U.S. at 469).

find the inferred fact because rational men would normally so conclude on the basis of common experience.

3. The instruction was not invalid because it allowed the jury to infer one element of the offense from proof of another element

Petitioner argues (Br. 8–9, 21–22) that the court should not have instructed the jury on the unexplained-possession inference in this case because "[i]t permitted the jury to infer the facts of knowledge, one element of the offense, from the fact of possession, the other element of the offense" (Br. 8). But if unexplained possession is a fact from which knowledge may reasonably be inferred, it should make no difference that both the proved fact and the inferable fact are elements of the offense. See *e.g., Adams* v. *New York,* 192 U.S. 585, where this Court upheld a state statute forbidding the knowing possession of policy slips and providing that possession would be "presumptive evidence" of knowledge.

Petitioner relies exclusively on the decision of the Fifth Circuit in *United States* v. *Cameron,* 460 F. 2d 1394 (Br. 18–22). In that case an attorney was charged with the knowing possession of currency recently stolen from a bank, and the evidence showed that he received the currency from the mother of a suspect in the robbery as a retainer for representing her son. The court held that the inference instruction should not have been given because it permitted the government to "pyramid the requisite element 'knowledge' on top of the requisite element

of 'possession' without the necessity of the prosecution's coming forward with a single additional evidentiary fact bearing on the appellant's knowledge of the stolen character of the money" (460 F. 2d at 1399).

The court there distinguished other cases on the ground that the fact upon which the inference was grounded was not itself an element of the offense. That analysis is unsound. The other decisions involved the offenses of transporting, receiving, and selling a stolen automobile. But in order to transport, receive, or sell an automobile, one must possess it. The result under *Cameron* is that knowledge cannot properly be inferred from possession if possession is itself an element of the offense, but may be inferred if possession is only an essential part of an element of the offense. The court cited no support for this strained conclusion, and we know of none. On the contrary, the courts of appeals have regularly upheld the unexplained-possession instruction completely without regard to whether the possession is itself an element of the offense.[20]

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[20] Indeed, the Fifth Circuit has itself approved such instructions with respect to the offense involved here, possession of stolen mail knowing it to have been stolen. See *United States* v. *Cook*, 419 F. 2d 1306; *Smith* v. *United States*, 413 F. 2d 1121. Even in cases decided after *Cameron*, the Fifth Circuit has upheld similar instructions where possession was an element. See *United States* v. *Martinez*, 466 F. 2d 679 (possessing securities stolen from the mail), and *United States* v. *Payne*, 467 F. 2d 828 (possessing property stolen from an interstate shipment of freight), in neither of which did the court mention *Cameron*.

See, also, *United States* v. *Gulledge*, 469 F. 2d 713 (C.A. 5), where the court, while acknowledging the *Cameron* holding,

C. THE INSTRUCTION DID NOT VIOLATE PETITIONER'S PRIVILEGE AGAINST COMPULSORY SELF-INCRIMINATION

Petitioner argues (Br. 7–8, 17–22) that the instruction violated his Fifth Amendment privilege against self-incrimination. Again relying almost entirely on the Fifth Circuit's *Cameron* decision, petitioner apparently contends that the instruction impermissibly interfered with his freedom to decide whether to testify and that it amounted to a comment on his failure to do so. Both contentions, however, have been correctly rejected by this Court. An inference instruction that satisfies the due process standards does not violate the accused's privilege against self-incrimination.

1. The instruction did not impermissibly interfere with petitioner's choice of whether to testify

Petitioner's first contention is fully answered by *Yee Hem* v. *United States*, 268 U.S. 178. The statute there authorized the jury to infer from the accused's unexplained possession of opium that he knew it had been imported illegally, and the Court held that the statutory inference was neither unreasonable nor arbitrary. In response to a Fifth Amendment argument similar to petitioner's here, the Court stated (*id.* at 185):

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sustained an unexplained-possession instruction in a case involving the interstate transportation of stolen property with knowledge that it was stolen. In *United States* v. *Townsend*, C.A. 5, No. 72-2100, decided February 13, 1973, the court again acknowledged *Cameron* but reaffirmed the validity of the "ancient and venerable" inference from unexplained possession, "which would allow us to affirm conviction for theft or for receiving stolen property" (slip op. 8).

> The point that the practical effect of the statute creating the presumption is to compel the accused person to be a witness against himself may be put aside with slight discussion. The statute compels nothing. It does no more than to make possession of the prohibited article *prima facie* evidence of guilt. It leaves the accused entirely free to testify or not as he chooses. If the accused happens to be the only repository of the facts necessary to negative the presumption arising from his possession, that is a misfortune which the statute under review does not create but which is inherent in the case. The same situation might present itself if there were no statutory presumption and a *prima facie* case of concealment with knowledge of unlawful importation were made by the evidence. The necessity of an explanation by the accused would be quite as compelling in that case as in this; but the constraint upon him to give testimony would arise there, as it arises here, simply from the force of circumstances and not from any form of compulsion forbidden by the Constitution.

The Court reaffirmed this view in *Turner*, where it held that, since the inference of knowledge from possession of smuggled heroin is a sound one, the trial court's instructions on that inference "did not place impermissible pressure upon [petitioner] to testify in his own defense" (396 U.S. at 418).[21]

The instructions here, like those in *Turner* (*id.* at

[21] Cf. *Harrison* v. *United States*, 392 U.S. 219, 222 (waiver of privilege by testifying is no less effective because the defendant was motivated "only by reason of the strength of the lawful evidence adduced against him").

406–407), specified that, "[i]n considering whether possession of recently stolen property has been satisfactorily explained, you are reminded that in the exercise of constitutional rights the accused need not take the witness stand and testify" (Tr. 124). In addition, the jury was told that "[p]ossession may be satisfactorily explained through other circumstances, other evidence, independent of any testimony of the accused" (*ibid.*).

There were "other circumstances" in this case that the jury could consider. Petitioner's statements to the postal inspector that he was given the checks by "dudes and chicks" who sold furniture for him were presented to the jury and relied upon by defense counsel in closing argument (see pp. 6–7, *supra*). Counsel told the jury that petitioner's statements to the inspector constituted his side of the story and that the inspector's testimony made it unnecessary for him to take the stand (note 5, *supra*).

In these circumstances, where petitioner decided not to testify, where the instructions specifically referred to "other circumstances, other evidence" as a source of an explanation for his possession of the checks, and where that other evidence was relied upon by defense counsel in presenting petitioner's defense, the instruction did not interfere with his freedom to decide whether to testify.

2. The instruction was not an adverse comment on petitioner's failure to testify

In *Cameron, supra,* the Fifth Circuit held that the unexplained-possession instruction, where possession

itself was an element of the offense, might have been understood by the jury as a comment on the defendant's failure to testify.[22] That holding, upon which petitioner exclusively relies, overlooks this Court's decision in *Gainey*.

The Court there rejected a similar contention: that the instruction on the inference from unexplained presence at an illegal still was a comment on the accused's failure to take the stand. The Court stated (380 U.S. at 70–71):

> [I]n the context of the instructions as a whole, we do not consider that the single phrase "unless the defendant by the evidence in the case and by proven facts and circumstances explains such presence to the satisfaction of the jury" can be fairly understood as a comment on the petitioner's failure to testify. * * * The judge's overall reference was carefully directed to the evidence as a whole, with neither allusion nor innuendo based on the defendant's decision not to take the stand. * * *

Not only did the judge here carefully refer to the evidence as a whole, but he also specifically charged the jury, in the context of the inference instruction, that possession could be explained by evidence in-

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[22] The court stated (460 F. 2d at 1400):

"The appellant having been charged with the offense of *possession*, it is altogether possible that when the jury heard the 'unexplained possession' charge, it concluded that the appellant was under a legal obligation to come forward with an explanation of his possession of the bills and that this obligation could be satisfied only through the trial testimony of the appellant. * * *"

dependent of any testimony by the accused, that the accused need not testify, and that no inference could be drawn from his failure to testify (see note 6 and pp. 7–9, *supra;* Tr. 126, 127). As we have shown, defense counsel urged the jury to credit precisely such independent evidence as a satisfactory explanation of petitioner's possession. Here, even more clearly than in *Gainey,* the instructions as a whole cannot fairly be understood as a comment on petitioner's failure to testify.

The fact that the possession that must be explained is itself an essential element of the offense is immaterial. For the reasons stated above, the distinction drawn by the *Cameron* court is unsound; it has been ignored even by the Fifth Circuit in subsequent decisions (see note 20, *supra*). That court's focus upon the single phrase "unexplained possession" would be particularly inapplicable here, where the judge told the jury, "You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole" (Tr. 113).

b. EVEN IF THE INSTRUCTION WAS IMPROPERLY GIVEN, THE ERROR WAS HARMLESS

Petitioner was convicted not only of possessing the Nettie Lewis and Mary Hernandez checks but also of forging and uttering them. The jury must, therefore, have believed beyond a reasonable doubt that petitioner wrote the payee's signature on each of those checks. The forging of a Treasury check stolen from the mail implies that the forger knew the checks were

stolen. It suggests that the jury would have found petitioner guilty of knowingly possessing stolen checks even without the challenged instruction.

The suggestion is fortified by the fact that the jury apparently placed controlling weight upon the testimony of the government handwriting expert. The evidence with respect to the four counts charging possession of the Lewis, Hernandez, Young, and Salazar checks was substantially the same. The difference was that the handwriting expert testified he was sure that petitioner signed the payees' names on the Lewis and Hernandez checks, while he was unsure about the signatures on the Young and Salazar checks. The instruction on the inference from unexplained possession was given with respect to all four checks, but the jury found petitioner not guilty of possessing the Young and Salazar checks. They apparently relied, not on the permissible inference of knowledge from unexplained possession, but on the more direct evidence of petitioner's having forged two of the checks.

In these circumstances, any error in instructing the jury on the inference was harmless. This Court reached a similar conclusion in *Turner*. The jury there had been told that possession of heroin without appropriate tax stamps was *prima facie* evidence that the possessor had violated the statute, which made it unlawful to purchase, sell, dispense or distribute a narcotic drug not in or from the original tax-stamped package. The Court held that the instruction was proper because it was reasonable to infer that one

possessing heroin had purchased it from an unstamped package. But it held alternatively that any error was harmless.

It explained that to convict, the jury must have believed that Turner possessed the drug, but that the only evidence of possession was that he had 275 glassine bags of heroin. "This evidence, without more, solidly established that Turner's heroin was packaged to supply individual demands and was in the process of being distributed, an act barred by the statute" (396 U.S. at 420). Applying the rule that conviction on an indictment charging several acts in the conjunctive must be sustained if the evidence is sufficient as to any of those acts, the Court held that the evidence was sufficient as to distributing the drug and that any error in the inference instruction was harmless.

Similarly, the jury here must have believed that petitioner forged the checks. This alone, without regard to the authorized inference, "solidly established" (*Turner, supra*) that petitioner knew the checks were stolen.[2] Though the indictment here did not charge acts in the conjunctive, the evidence was sufficient, even without the inference, to support a guilty verdict on the single act charged—possessing the checks knowing them to have been stolen.

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[2] Though one could hypothesize that petitioner found the checks and did not know they were stolen, one could as easily have hypothesized in *Turner* that the 275 glassine bags were for Turner's own use. Neither hypothesis precludes a finding of harmless error, however, because each is based upon mere speculation and not upon reason grounded in the evidence.

II

A VIOLATION OF 18 U.S.C. 1708 IS ESTABLISHED BY SHOWING THAT THE DEFENDANT KNEW THAT THE PROPERTY HE POSSESSED WAS STOLEN; IT IS UNNECESSARY TO SHOW THAT HE KNEW IT WAS STOLEN FROM THE MAIL

THE STATUTE AND ITS HISTORY SHOW THAT CONGRESS INTENDED TO PROHIBIT THE POSSESSION OF STOLEN MAIL WITH KNOWLEDGE THAT IT WAS STOLEN, WITHOUT REQUIRING KNOWLEDGE THAT IT WAS STOLEN FROM THE MAIL

Under 18 U.S.C. 1708, it is a crime to buy, receive, conceal, or possess any article stolen from the mail "knowing the same to have been stolen" (see pp. 2-3, *supra*). The language is unambiguous. It requires proof of only two elements: that the article was stolen from the mail, and that the defendant knew it was stolen. It does not require that he knew it was stolen from the mail.

The statute's legislative history confirms that this was the intent of Congress. The predecessor of 18 U.S.C. 1708 originally proscribed possession of articles stolen from the mail "knowing the same to have been *so* stolen" (18 U.S.C. (1934 ed.) 317; emphasis added). Early decisions of the lower federal courts construed the clause as requiring proof that the accused knew the article was stolen specifically from the mail. See, *e.g.*, *Brandenburg* v. *United States*, 78 F. 2d 811 (C.A. 3).

In response to those holdings, Congress amended the statute in 1939 to eliminate that requirement by removing the word "so" preceding the word "stolen." The House committee report stated it was the pur-

pose of the amendment to allow conviction "without requiring the Government to prove also that the defendant knew the property received had been stolen from the mails."[24] It was anticipated that the amendment would restrict the market for stolen mail.[25]

Since this amendment, the few courts that have considered this issue have agreed that the element of knowledge under Section 1708 is established by a showing that the defendant knew the items he possessed were stolen. See *United States* v. *Hines*, 256 F. 2d 561 (C.A. 2); *Smith* v. *United States*, 343 F. 2d 539 (C.A. 5); *United States* v. *Gardner*, 454 F. 2d 534 (C.A. 9), certiorari denied, No. 71-6792,

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[24] H. Rep. No. 734, 76th Cong., 1st Sess., p. 1:

"Under the existing statute it is necessary for the Government, in order to secure a conviction for the crime of receiving property stolen from the mails, to prove not only that the property was stolen from the mails and that the receiver knew it was stolen, but also that he knew it was stolen from the mails. The reported bill amends the existing law so that it will sustain a conviction for the Government to prove that the property was in fact stolen from the mails and that the defendant knew the property he received had been stolen. The committee feel that this should be sufficient without requiring the Government to prove also that the defendant knew the property received had been stolen from the mails.

"The Postmaster General, who recommended the enactment of this amendment, in a communication to the Speaker of the House pointed out that defendants have been enabled to escape conviction under the present law by denying that they knew the articles received had been stolen from the mails. He also gives his opinion that this amendment will tend to discourage this form of crime by restricting the market for the stolen articles."

See also S. Rep. No. 861, 76th Cong., 1st Sess.

[25] H. Rep. No. 734, *supra*.

October 10, 1972; *United States* v. *Schultz*, 462 F. 2d 622 (C.A. 9).[26]

B. CONGRESS MAY PROHIBIT THE KNOWING POSSESSION OF STOLEN PROPERTY THAT WAS STOLEN FROM THE MAIL

Petitioner asserts (Br. 11), without citation of authority, that "[t]he only way to properly tie in Federal jurisdiction is to require that the defendant knew these articles were stolen from the United States Mail." Congressional power to protect the mail is not that restricted.

The offense of which petitioner was convicted was possession of property stolen from the mails which he knew was stolen. The basic crime was knowing possession of stolen property. The fact that the theft had been from the mails was significant only as a basis for establishing federal jurisdiction. The element of knowledge that the property was stolen is important to insure that innocent possession is not punished. But once the defendant's culpability is established by proof that he knows the property is stolen, there is no reason further to require that he also knows that the theft was from a federal instrumentality.

The broad authority of Congress over the postal

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[26] The two cases relied on by petitioner (Br. 11) do not hold to the contrary. In *Wilson* v. *United States*, 317 F. 2d 363 (C.A. 10), the question was whether the evidence was adequate to show that the matter had in fact reached the mails prior to the theft. In *Allen* v. *United States*, 387 F. 2d 611 (C.A. 5), it was whether the evidence was adequate to show that the matter was stolen before it left the mails. Neither court considered, much less resolved, the issue whether the accused must have knowledge that the matter was stolen from the mail.

system includes the power to prohibit conduct which interferes with the proper operation of the mails. See *Ex parte Jackson*, 96 U.S. 727. Theft from the mails obviously is such conduct, and possession of property that has been stolen from the mails with the knowledge that it is stolen similarly may be prohibited in order to protect the mails.

The lower federal courts have repeatedly and consistently held that in crimes defined by Congress, knowledge of the federal jurisdictional element of the crime is not an element of the offense.[25] The Final Report of the National Commission on Reform of

[25] 18 U.S.C. 2312 (interstate transportation of a stolen vehicle knowing it to be stolen): Knowledge by a defendant that he crossed state lines is not necessary. *Bibbins* v. *United States*, 400 F. 2d 544 (C.A. 9).

18 U.S.C. 2313 (receiving stolen vehicle moving in interstate commerce knowing it to have been stolen): Proof of knowledge that the vehicle has moved across state lines is not necessary. *Overton* v. *United States*, 405 F. 2d 168 (C.A. 5); *Pilgrim* v. *United States*, 266 F. 2d 486 (C.A. 5); *Brubaker* v. *United States*, 183 F. 2d 894 (C.A. 6); *United States* v. *Hamilton*, 456 F. 2d 171 (C.A. 3), certiorari denied, 406 U.S. 947.

18 U.S.C. 2314 (interstate transportation of stolen goods knowing them to be stolen): Knowledge of the goods' having crossed state lines is unnecessary. *United States* v. *Kirschke*, 315 F. 2d 315 (C.A. 6); *United States* v. *White*, 451 F. 2d 559 (C.A. 6), certiorari denied, 405 U.S. 1071; *United States* v. *Miagola*, 424 F. 2d 710 (C.A. 2); *United States* v. *Strauss*, 443 F. 2d 986 (C.A. 1), certiorari denied, 404 U.S. 854; *United States* v. *Masters*, 456 F. 2d 1060 (C.A. 9).

18 U.S.C. 2315 (receiving goods moving as part of interstate commerce knowing them to be stolen): Knowledge that the goods were moving in interstate commerce is unnecessary. *Pugliano* v. *United States*, 348 F. 2d 902 (C.A. 1), certiorari denied, 382 U.S. 939; *United States* v. *Allegretti*, 340 F. 2d 243 (C.A. 7), certiorari denied, 381 U.S. 911; *Corey* v. *United*

Federal Criminal Laws includes suggested provisions expressly negating any requirement that an offender be shown to have had knowledge of the jurisdictional

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States, 305 F. 2d 232 (C.A. 9), certiorari denied, 371 U.S. 956; *United States* v. *Cordo*, 186 F. 2d 144 (C.A. 2), certiorari denied *sub nom. Minkoff* v. *United States*, 340 U.S. 952; *United States* v. *Hamilton*, 456 F. 2d 171 (C.A. 3), certiorari denied, 406 U.S. 947.

18 U.S.C. 1343 (using interstate communication facilities to further a scheme to defraud): Knowledge of use of an interstate facility is unnecessary. *Blassingame* v. *United States*, 427 F. 2d 329 (C.A. 2), certiorari denied, 402 U.S. 945.

18 U.S.C. 2113(c) (receiving money taken from a federally insured bank): Knowledge that the money was from a federally insured bank is unnecessary. *Nelson* v. *United States*, 415 F. 2d 483 (C.A. 5), certiorari denied, 396 U.S. 1060.

18 U.S.C. 641 (theft and receipt of property of the United States): Knowledge that property knowingly converted belongs to the government is unnecessary. *United States* v. *Howey*, 427 F. 2d 1017 (C.A. 9); *United States* v. *Boyd*, 446 F. 2d 1267, 1274 (C.A. 5); cf. *Findley* v. *United States*, 362 F. 2d 921 (C.A. 10).

18 U.S.C. 1952 (traveling in or utilizing interstate commerce to facilitate an unlawful activity): Knowledge that interstate facilities were used is unnecessary. *United States* v. *Bash*, 258 F. Supp. 807 (N.D. Ind.), affirmed *sub nom. United States* v. *Miller*, 379 F. 2d 183, 187 (C.A. 7), certiorari denied, 389 U.S. 930; *United States* v. *Roselli*, 432 F. 2d 879 (C.A. 9), certiorari denied, 401 U.S. 924; *United States* v. *Hanon*, 428 F. 2d 101 (C.A. 8), certiorari denied, 402 U.S. 952; cf. *United States* v. *Chase*, 372 F. 2d 453 (C.A. 4), certiorari denied, 387 U.S. 907.

18 U.S.C. 111 (assaulting a federal officer): Knowledge that the victim was a federal employee is not necessary. *United States* v. *Goodwin*, 440 F. 2d 1152 (C.A. 3); *United States* v. *Lamont*, 425 F. 2d 636 (C.A. 1); *United States* v. *Kiraly*, 445 F. 2d 291 (C.A. 6), certiorari denied, 404 U.S. 915; *United States* v. *Kartman*, 417 F. 2d 893 (C.A. 9); *United States* v. *Leach*, 429 F. 2d 956 (C.A. 8), certiorari denied, 402 U.S. 986; *United States* v. *Gaechter*, 436 F. 2d 364 (C.A. 7).

element of the offense.[28] We know of no decision holding that federal jurisdiction depends upon the accused's knowledge that his offense could be prosecuted by the federal government.

Petitioner's conduct here—possessing Treasury checks knowing them to have been stolen—would have been an offense under California law as well as federal law.[29] It is no defense to his federal prosecution that he was unaware at the time he received the stolen checks that they had been stolen from the mail and that he would therefore be subject to federal prosecution.

III

PETITIONER WAS PROPERLY GIVEN SEPARATE CONCURRENT SENTENCES FOR THE CRIMES OF FORGING AND UTTERING A SINGLE CHECK

Petitioner was convicted on separate counts of forging and uttering the Lewis and Hernandez checks. In each case the forgery was proved by the testimony of the government handwriting expert, who found that petitioner had signed the payee's name on each check (App. 14);[30] the uttering was proved by the testi-

[28] Section 204 provides: "Except as otherwise expressly provided, culpability is not required with respect to any fact which is solely a basis for federal jurisdiction." The provision is duplicated in proposed Section 302(3)(c).

[29] Cal. Penal Code § 496(1) provides in part:

"Every person who buys or receives any property which has been stolen or which has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, * * * is punishable by imprisonment * * *."

[30] There is thus no substance to petitioner's claim (Br. 23) that the evidence was insufficient to show that he forged the checks.

mony of a bank teller that petitioner deposited each check, bearing the purported signature of the payee and the second endorsement of "Clarence Smith," in his "Smith" account (App. 10–11). The three-year sentences for these four counts were concurrent with each other and concurrent with the three-year sentences for possessing the checks knowing them to have been stolen.

Petitioner argues that separate conviction and sentencing for forging and uttering the same check is "double punishment" in violation of the Eighth Amendment. But since the three-year sentences for all six counts were concurrent, the claim of "double punishment" is wholly hypothetical. Petitioner points to no prejudice that will result from the concurrent sentences on the uttering counts, and there is no occasion for this Court to decide this issue.[31]

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[31] *Benton* v. *Maryland*, 395 U.S. 784, held that the imposition of concurrent sentences did not constitute a jurisdictional bar to consideration of a challenge to a conviction on one or more counts not necessary to sustain the sentence. The Court's opinion did not rule out the application of the concurrent-sentence doctrine "as a principle of judicial efficiency which permits judges to avoid decision of issues which have no appreciable impact on the rights of any party" (*id.* at 792). The courts of appeals have continued to employ the doctrine in this manner in circumstances such as those presented here. See, *e.g.*, *United States ex rel. Epton* v. *Nenna*, 446 F. 2d 363 (C.A. 2); *United States* v. *Adcock*, 447 F. 2d 1337, 1339 (C.A. 2); *United States* v. *Bursaiaux*, 449 F. 2d 1299 (C.A. 5), certiorari denied, 397 U.S. 972; *Turnestad* v. *United States*, 418 F. 2d 1043, 1046 (C.A. 8); *Jordan* v. *United States*, 416 F. 2d 338, 346 (C.A. 9), certiorari denied, 397 U.S. 920; cf. *United States* v. *Spears*, 449 F. 2d 946, 948–949 (C.A. D.C.); *United States* v. *McKenzie*, 444 F. 2d 808 (C.A. 3).

In any event, we submit that, since forgery and uttering involve different acts and are distinct crimes, they may be separately punished. In deciding whether separate punishment may be imposed for related criminal acts, or for a single act that violates two statutory provisions, this Court has looked to the congressional intent in enacting the particular statute to determine whether separate punishment was contemplated. Thus, in *Gore* v. *United States,* 357 U.S. 386, the Court upheld consecutive sentences upon separate convictions for selling narcotics not pursuant to a written order form, selling narcotics not in or from the original stamped package, and facilitating the concealment and sale of narcotics. Each of these was based upon a single sales transaction. The Court found that Congress intended in these three separate provisions to provide separate punishment even if all three were violated in the course of one transaction. See, also, *Blockburger* v. *United States,* 284 U.S. 299, 304:

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. * * * [2]

[2] Similarly, in *Callanan* v. *United States,* 364 U.S. 587, the issue was whether consecutive sentences could be imposed for convictions under the Hobbs Anti-Racketeering Act for obstructing interstate commerce by extortion and for conspiring to do so. The Court held that, in view of the long-established distinction between a substantive offense and a conspiracy to commit it, and in the absence of a contrary indication of legislative intent, the two offenses could be separately punished.

On the other hand, where it has appeared that Congress intended only a single punishment, or where its intent was ambiguous, separate sentences have been held unlawful. See *Bell* v. *United States*, 349 U.S. 81 (simultaneous transportation of more than one woman in violation of Mann Act is a single offense); *Prince* v. *United States*, 352 U.S. 322 (robbery of a federally insured bank and entering the bank with intent to commit a felony may not be punished separately); *Heflin* v. *United States*, 358 U.S. 415 (robbery of a federally insured bank and receiving the proceeds are not separately punishable); *Ladner* v. *United States*, 358 U.S. 169 (single act of assault affecting two federal officers is a single offense).

Although, as this Court has noted "[t]here is no significant legislative history illuminating [18 U.S.C.] 495 or any of its predecessors" (*Gilbert* v. *United States*, 370 U.S. 650, 655), the face of the statute indicates that forging and uttering a Treasury check are separate offenses which may be separately punished. Section 495 (set forth at pp. 3–4, *supra*) creates three separate crimes: forgery of a writing to obtain any sum of money from the United States; the uttering of such a writing, knowing it to be forged, with intent to defraud the United States; and the transmitting of such a writing, knowing it to be forged, in support of a claim with intent to defraud the United

States. Each of these provisions proscribes a separate act which is not necessarily linked to the others.[33] One can forge a writing without uttering or transmitting it; one can utter a forged writing without having been the forger. Congress could reasonably determine that the commission of both acts should be punishable with more severity than the commission of only one or the other, because two separate wrongs are involved.

The courts of appeals have thus treated forgery and uttering as distinct crimes under various statutes. See, *e.g.*, *Read* v. *United States*, 299 Fed. 918, 921–922 (C.A. D.C.); *United States* v. *Maybury*, 274 F. 2d 899, 903–904 (C.A. 2); *United States* v. *Wilson*, 441 F. 2d 655 (C.A. 2); *French* v. *United States*, 232 F. 2d 736 (C.A. 5), certiorari denied, 352 U.S. 851; *Barker* v. *Ohio*, 328 F. 2d 582 (C.A. 6); *United States* v. *Huggins*, 184 F. 2d 866 (C.A. 7); *Ross* v *United States*, 374 F. 2d 97 (C.A. 8), certiorari denied, 389

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[33] At common law, too, the crimes were distinct. Forgery was "the fradulent making or alteration of a writing, to the prejudice of another man's right" (4 Blackstone, *Commentaries*, p. 247 (1900)); "the offence of forgery may be complete, though there be no publication or uttering of the forged instrument" (Gabbett, *Criminal Law*, p. 350 (1843)). Uttering was committed "when one by words or writing pronounceth or publisheth the deed, &c. to any other as true." 3 *Coke's Institutes*, p. 171 (1797). It was "an offence distinct from, though connected with, the act of false making or forgery * * *." 2 East, *Pleas of the Crown*, p. 973 (1803).

U.S. 882; *Wiley* v. *United States*, 144 F. 2d 707 (C.A. 9); *DeMaurez* v. *Squier*, 144 F. 2d 564 (C.A. 9).

This is not a case such as *Bell* or *Ladner*, where a single act has been punished as two offenses; nor is it a situation like *Prince* or *Heflin*, where one offense is a lesser form of the other which Congress did not intend to be punished separately. Petitioner was convicted of two separate acts with respect to each check. Conviction of those offenses required proof of different facts for each. Neither forgery nor uttering is a lesser form of the other, and there is no reason to think that Congress meant to preclude double punishment for one who commits both offenses. As in *Callanan*, *supra*, "[t]his is an ordinary case of a defendant convicted of violating two separate provisions of a statute, whereby Congress defined two historically distinctive crimes composed of differing components" (364 U.S. at 597).[4]

[4] Petitioner also asserts (Br. 23) that he "was denied equal protection by the failure of the government to supply him with an independent handwriting expert." Under 18 U.S.C. 3006A (e)(1), counsel for an indigent defendant may request, in an *ex parte* application, authority to obtain at government expense "investigative, expert, or other services necessary for an adequate defense * * *." If the cost of those services is not more than $150, counsel is authorized to obtain them in advance of authorization, subject to later review by the court. 18 U.S.C. 3006A(e)(2). There is nothing in the record to show that counsel sought or was denied authorization for obtaining the services of a handwriting expert.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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